Supreme Court, U.S.
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No. 03-943

In The

Supreme Court of the United States

SECURED ENVIRONMENTAL MANAGEMENT, INC.,

Petitioner,

v.

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY and CITY OF MONT BELVIEU,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Texas

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Reserve Conservation & Recovery Act ("RCRA"), 42 U.S.C. § 6901, et seq., expressly authorizes the disposal of non-liquid hazardous waste in a salt dome cavern. Section 9.02 of House Bill 2912 of the 77th Texas Legislature (2001) amended Section 361.114 of the Texas Health & Safety Code to completely ban the disposal of hazardous waste – both liquid and non-liquid – in a salt dome cavern.

Under the doctrine of federal preemption, does the relevant section of House Bill 2912 violate the supremacy clause of the United States Constitution?

CORPORATE DISCLOSURE STATEMENT

Petitioners are Secured Environmental Management, Inc. There is no parent or publicly held company owning 10% or more of its stock and it owns no subsidiaries.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

Secured Environmental Management, Inc. respectfully petitions for a Writ of Certiorari to review the judgment of the Supreme Court of Texas in this case.

OPINIONS BELOW

The opinion of the Third Court of Appeals in Austin, Texas (App., No. 1) is reported at 97 S.W.3d 246. The Final Judgment of the 200th Judicial District Court of Travis County, Texas, the trial court is not reported (App., No. 2). The Supreme Court of Texas denied the Petition for Review (App., No. 3).

JURISDICTION

The Supreme Court of Texas entered its judgment on September 25, 2003 (App., No. 3). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISION INVOLVED

42 U.S.C. § 6924(b) provides, in relevant part, that "the placement of any non-liquid hazardous waste . . . in a salt dome formation . . . is prohibited until such time as a permit has been issued under Section 6925(c) of this Title for the facility concerned." Texas Health & Safety Code, Section 361.114, provides, in relevant part, the Commission by rule shall prohibit the storage, processing, or

disposal of hazardous waste in a solution-mined salt dome cavern or a sulphur mine.

STATEMENT

Petitioner, Secured Environmental Management, Inc., ("SEM") filed suit against what is now the Texas Commission on Environmental Quality ("TCEQ").[1] Suit was filed in the 200th Judicial District Court of Travis County, Texas, seeking under the doctrine of federal preemption, to have a portion of House Bill 2912 of the 77th Texas Legislature declared unconstitutional under the supremacy clause of the United States Constitution. The City of Mont Belvieu intervened. On stipulated facts, the parties' submitted cross-motions for summary judgment to the trial court. The court granted the Commission's motion and denied SEM's motion. SEM perfected appeal to the Third Court of Appeals in Austin, Texas, which agreed with the trial court. SEM timely perfected an appeal to the Supreme Court of Texas, which denied SEM's petition for review.

A. Resource Conservation & Recovery Act and State Authorization

This case involves the construction of the statutory provision of RCRA, wherein the EPA may authorize states to carry out state-law-based hazardous waste regulatory programs in lieu of the federal program established by RCRA, as long as the state-law requirements are at least

[1] The agency was formerly called the Texas Natural Resource Conservation Commission ("TNRCC").

as stringent as under federal law. The construction of the provision is aided by an understanding of the background and objectives of RCRA.

The Resource Conservation & Recovery Act (RCRA) was enacted in 1976 as an amendment to the earlier Solid Waste Disposal Act of 1965. *See* 42 U.S.C. § 6901-6991 (West 1995 & Supp. 2002). It was significantly amended in 1984. Subtitle C of RCRA, §§ 6921-6939(b), regulates hazardous waste and requires the EPA to promulgate regulations to govern the treatment, storage and disposal of such waste. *Environmental Defense Fund v. EPA,* 852 F.2d 1309, 1310 (D.C. Cir. 1988). "RCRA is a comprehensive statute that empowers EPA to regulate hazardous waste from cradle to grave, in accordance with the rigorous safeguards and waste management procedures of Subtitle C." *City of Chicago v. Environmental Defense Fund,* 511 U.S. 328, 331, 114 S.Ct. 1588, 1590, 128 L.Ed.2d 302 (1994). In general, Subtitle C "prohibits the treatment, storage or disposal of hazardous waste at private or governmental facilities without a permit issued by either the United States agency . . . or an authorized state." *United States v. Kentucky,* 252 F.3d 816-822 (6th Cir. 2001). The "center piece" of Subtitle C is a set of land disposal restrictions contained primarily in 42 U.S.C. § 6924. *See Edison Elec. Institute v. EPA,* 996 F.2d 326, 328 (D.C. Cir. 1993).

At first glance, RCRA is intimidatingly complex and convoluted. For our purposes, however, only a relatively few sections of RCRA come into play, and when broken down into manageable parts, the statute loses some of its aura of impenetrability. Overall, RCRA extends from Section 6901 through Section 6991 of Title 42 of the United States Code. The first few sections contain the

expected general materials: Section 6901 contains Congressional findings, Section 6902 contains the objectives and national policy of RCRA and Section 6903 contains definitions. Section 6924 of RCRA is a lengthy section relating to standards applicable to owners and operators of hazardous waste treatment, storage and disposal facilities. It is the key portion of the statute in the present dispute. Section 6925 relates to permits for the treatment, storage or disposal of hazardous waste. One subsection of Section 6925 has a small but important role in the dispute.

Section 6926 relates to the authorization of state hazardous waste programs. Through this section, states are authorized to carry out their own hazardous waste program in lieu of the federal program under Subtitle C of RCRA, if they demonstrate to the EPA that the state program is equivalent to the federal program, consistent with the federal and state programs applicable in other states, and provides adequate enforcement of compliance with the requirements of Subtitle C. *See* 42 U.S.C. § 6926(b). In essence, this section seeks to implement the "federal-state partnership" for managing hazardous waste that constitutes one of the objectives of RCRA. *See* 42 U.S.C. § 6902(a)(7).

Section 6929, sometimes referred to as RCRA's "savings provision", relates to the general authority that states retain to impose requirements different from those contained in Subtitle C. This section prohibits states and political subdivisions from imposing any requirements less stringent than those authorized under Subtitle C, but expressly provides that "nothing in this chapter shall be construed to prohibit any state or political subdivision thereof from imposing any requirements, including those

for site selection, which are more stringent than those imposed by such regulations". 42 U.S.C. § 6929.

Central to this dispute is 42 U.S.C. § 6924. It contains twenty-five (25) subdivisions, designated "(a)" through "(y)". Subsection (a), which orders the EPA to promulgate regulations establishing standards applicable to owners and operators of facilities for the treatment, storage or disposal of hazardous waste, was the only portion of the original section that was enacted in 1976. Subsections (b) through (x) were added in the 1984 amendments, and subsection (y) was added in 1992.

Subsection (b) of section 6924 relates specifically to the placement of hazardous waste in salt dome formations. This section provides as follows, in pertinent part:

> (1) Effective on November 8, 1984, the placement of any non containerized or bulk liquid hazardous waste in any salt dome formation, salt bed formation, underground mine or cave is prohibited until such time as –
>
> > (A) the Administrator has determined, after notice and opportunity for hearings on the record in the effective areas, that such placement is protective of human health and the environment;
> >
> > (B) the Administrator has promulgated performance and permitting standards for such facilities under this subchapter; and
> >
> > (C) a permit has been issued under section 6925(c) of this Title for the facility concerned.
>
> (2) Effective on November 8, 1984, the placement of any hazardous waste other than a hazardous

> waste referred to in paragraph (1) in a salt dome formation, salt bed formation, underground mine or cave is prohibited until such time as a permit has been issued under section 6925(c) of this Title for the facility concerned.

42 U.S.C. § 6924(b).

First, it is apparent Congress intended to treat liquid and non-liquid hazardous waste differently in terms of placement in salt dome caverns. Subsection (b)(1) applies only to liquid hazardous waste. Subsection (b)(2), on the other hand, applies to non-liquid hazardous waste. Second, it is obvious that Congress was substantially more concerned about the placement of liquid hazardous waste in salt dome caverns than about the placement of non-liquid hazardous waste. Subsection (b)(1) contains three requirements before liquid hazardous waste can be placed in a salt dome cavern. Subsection (b)(2), on the other hand, has only one requirement: that a permit has been issued "under section 6925(c) . . . for the facility concerned". Thus, for non-liquid hazardous waste to be placed in a salt dome cavern, it is not necessary that the EPA Administrator have made an affirmative finding that such placement is protective of human health and the environment. It is not even necessary that the EPA Administrator have promulgated performance and permitting standards for such facilities. It is only necessary that a permit have been issued under section 6925(c).

Section 6925(c) of RCRA provides as follows:

> (1) Upon a determination by the Administrator (or a State, if applicable), of a compliance by a facility for which a permit is applied for under this section with the requirements of this section and

> section 6924 of this Title, the Administrator (or the State) shall issue a permit for such facility.

B. Purposes and Objectives

The national policy reflected by RCRA is stated in the statute as follows:

> The Congress hereby declares it to be the national policy of the United States that, wherever feasible, the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible. Waste that is nevertheless generated should be treated, stored or disposed of so as to minimize the present and the future threat to human health and the environment.

42 U.S.C. § 6902(b) (West 1995). The Supreme Court has recognized the primacy of these stated purposes:

> RCRA is not principally designed to effectuate the cleanup of toxic waste sites or to compensate those who have attended to the remediation of environmental hazards. RCRA's primary purpose, rather, is to reduce the generation of hazardous waste and insure the proper treatment, storage and disposal of that waste which is nonetheless generated, "so as to minimize the present and future threat to human health and the environment".

Meghrig v. KFC Western, Inc., 516 U.S. 479, 483, 116 S.Ct. 1251, 1254, 134 L.Ed.2d 121 (1996).

RCRA describes its objectives as follows:

> The objectives of this chapter are to promote the protection of health and environment and to conserve valuable material and energy resources by –

> (3) prohibiting future open dumping on the land and requiring the conversion of existing open dumps to facilities which do not pose a danger to the environment or the health;
>
> (4) assuring that hazardous waste management practices are conducted in a manner which protects human health and the environment;
>
> (5) requiring that hazardous waste be properly managed in the first instance thereby reducing the need for corrective action at a future date;
>
> (6) minimizing the generation of hazardous waste and the land disposal of hazardous waste by encouraging process substitution, material recovery, properly conducted recycling and reuse, and treatment; and
>
> (7) establishing a viable Federal-State partnership to carry out the purposes of this chapter and insuring that the Administrator will, in carrying out the provision of Subchapter III [Title C] of this chapter, give a high priority to assisting and cooperating with States in obtaining full authorization of State programs under subchapter III of this chapter.

42 U.S.C. § 6902(a)(3)-(7). Thus, Congress seeks, through RCRA, to regulate land disposal facilities "so as to minimize the present and future threat to human health and the environment".

Methods of process substitution, materials recovery, recycling, reuse and treatment are clearly preferred over land-disposal methods, which, in some RCRA provisions, include land fills, surface impoundments, waste piles, injection wells, land treatment facilities, salt dome formations, salt bed formations, underground mines and caves.

See 42 U.S.C. §§ 6902(a)(6), 6924(k). But the objective of RCRA is not solely to encourage treatment and reuse methods. RCRA evidences a Congressional recognition that land-disposal methods can, under appropriate guidelines, be conducted safely. Land-disposal methods of dealing with hazardous waste form an integral part of the statutory scheme created by Congress.

RCRA contains specific Congressional findings that shed light on the nature of Congress' concerns about land disposal of hazardous waste. 42 U.S.C. § 6901(b). Congress concludes that land fills and surface impoundments should not be absolutely prohibited. Rather, the provision simply states that they should be "least favored" methods for managing hazardous waste. In other words, Congress necessarily concluded that the least safe land-disposal methods can, with appropriate regulatory guidelines, be used safely and therefore are still an integral part of the overall scheme for the safe management of hazardous waste.

Some methods of disposal were completely banned by RCRA. For example, Section 6924(c) provides that "the placement of bulk or non-containerized liquid hazardous waste or free liquids contained in hazardous waste . . . in any land fill is prohibited". In other instances, RCRA imposes prohibitions that can be lifted only if the Administrator of the EPA affirmatively determines the prohibition is not needed. *See* 42 U.S.C. §§ 6924(d)(1), (e)(1) (West 1995). But, regarding the use of salt dome caverns for the disposal of non-liquid hazardous waste, the only requirement is that a permit be issued for the facility concerned. *See* 42 U.S.C. § 6924(b).

C. Proceedings Below

In 1994, SEM filed permit applications for the disposal of hazardous waste in salt caverns with what is now the Texas Commission on Environmental Quality (TCEQ). While the applications were pending, the Legislature amended Texas Health & Safety Code Section 361.114 to prohibit disposal of hazardous waste in a solution-mined salt dome cavern. Upon receipt of the Executive Director's letter of July 26, 2001, wherein the Executive Director advised SEM of his decision to cease the review of SEM's applications for disposal of hazardous waste in salt caverns, pursuant to House Bill 2912, SEM filed suit in the 200th Judicial District Court of Travis County, Texas, seeking a declaration that the relevant section of the Texas Health & Safety Code was contrary to federal law and preempted under the supremacy clause of the United State Constitution. On stipulated facts, the parties' submitted cross-motions for summary judgment. The trial court held that Section 361.114 was not preempted and granted Defendants' Motion for Summary Judgment.

SEM timely perfected an appeal to the Court of Appeals for the Third District of Texas at Austin, which agreed with the trial court and affirmed the judgment. The appeals court reasoned that Section 361.114, "by placing a ban on certain means of waste disposal, creates a more stringent waste disposal regulation than RCRA's and, therefore, falls within Section 6929's scope and is saved (App. No. 1, page 7). The court acknowledged that Texas' Section 361.114 "may stand in some tension with RCRA, but . . . that they are not in conflict with one another" (App. No. 1, page 7). The court further reasoned that if Congress has the ability "to regulate waste disposal by creating an out right ban on liquid hazardous waste

disposal in certain geologic formations, then Texas' power . . . must include the ability to extend that ban in order to meet the same underlying policy concerns" (App. No. 1, page 7). Finally, the appellate court asserts that RCRA may "preempt state policies that are more stringent than federal requirements, *but only* if there exist an affirmative federal order or program" (App. No. 1, page 7).

SEM timely perfected an appeal to the Supreme Court of Texas, which, within its discretionary power, declined to review the opinion (App. No. 3).

REASONS FOR GRANTING THE PETITION

Conflicting decisions are proliferating and the need for guidance from this Court is imperative. This case is timely with regard to past advances in technology and an opportunity to provide the needed guidance. Moreover, the decision below is erroneous, and the issue that it addresses is of national importance.

Texas' court of last resort has decided an important federal question in a way that conflicts with decisions of other state courts of last resort and of United States Courts of Appeals. The clearest message sent by both federal and state courts in this area is that a complete ban on a type of technology (or interstate movement) regarding the treatment, storage or disposal of hazardous waste is preempted by RCRA.

The United States Supreme Court has concisely summarized federal preemption law as follows:

> Under the Supremacy Clause, federal law may supersede state law in several different ways.

> First, when acting within constitutional limits, Congress is empowered to pre-empt state law by so stating in express terms. In the absence of express pre-emptive language, Congress' intent to pre-empt all state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation. Pre-emption of the whole field also will be inferred where the field is one in which "the federal interest is so dominant that the federal system would be assumed to preclude enforcement of state laws on the same subject.
>
> Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress". . . . Also, for the purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws.

Hillsborough Co. v. Automated Medical Laboratories, Inc., 471 U.S. 707, 713, 105 S.Ct. 2371, 2375, 85 L.Ed.2d 714 (1985).

The present case is based on the third type of preemption – i.e., conflict preemption – because House Bill 2912 stands as an obstacle to the accomplishment and execution of the full purposes and objectives of RCRA. Even where the overall goals of the state and federal laws are the same, a state or local law is preempted "if it interferes

with the methods by which the federal statute was designed to reach this goal." *International Paper Co. v. Ouellette,* 479 U.S. 481.494, 107 S.Ct. 805, 813, 93 L.Ed.2d 883 (1987). The ultimate task is to determine whether the state law "is consistent with the structure and purpose of the [federal] statute *as a whole*" and with its object and policy. *Gade v. National Solid Wastes Management Ass'n,* 505 U.S. 88, 98, 112 S.Ct. 2374, 2383, 120 L.Ed.2d 73 (1992).

One of the earliest and most often cited cases in this area is *ENSCO, Inc. v. Dumas*, 807 F.2d 743 (8th Cir. 1986). In that case, Union County, Arkansas enacted an ordinance prohibiting storage, treatment or disposal of hazardous waste within its boundaries. ENSCO, which wished to incinerate hazardous waste at its Union County facility, brought suit challenging the ordinance. The district court found the ordinance invalid as preempted by RCRA. The Eight Circuit affirmed, holding that:

> The conflict between Ordinance No. 171 and the purposes and objectives of the RCRA is clear. The RCRA emphasizes the need for safe disposal and treatment of hazardous waste and grants to the EPA the authority to develop and detail appropriate waste procedures and to outlaw less healthful practices. Ordinance No. 171, however, ignores that F020 series waste do exist, and through its ban on storage, treatment, and disposal in essence mandates that these waste in Union County will not be handled in the manner deemed safest by Congress and the EPA.
>
> Section 6929 [RCRA's so-called "savings provisions"] acknowledges only the authority of state and local governmental entities to make good

> faith adaptations of federal policy to local conditions. The record suggests that Union County in passing Ordinance 171 was not so acting. A county cannot, by attaching the label "more stringent requirements" or "site selection" to an ordinance that in language and history defies such description, arrogate to itself the power to enact a measure that as a practical matter cannot function other than to subvert federal policies concerning the safe handling of hazardous waste.

Id. at 745.

The *ENSCO* opinion was quoted and relied on by the Arkansas Supreme Court in *City of Jacksonville v. Arkansas Department of Pollution Control & Ecology*, 824 S.W.2d 840 (Ark. 1992). There, the Jacksonville City Council passed an ordinance that only allowed the incineration of chemical waste that was already located at the plant site. In other words, the ordinance prohibited transporting additional waste from off site to a particular incinerator for disposal. The trial court granted summary judgment declaring that the ordinance was preempted by RCRA and the Comprehensive Environmental Response, Compensation & Liability Act (CERCLA). The Arkansas Supreme Court affirmed, holding that:

> The EPA proposes to transport hazardous waste from the city's two land fills to the former plant site for incineration. The city's ordinances would prohibit incineration of any waste already located at the former plant site. CERCLA permits the transfer of any hazardous substance off site for remediation so long as the facility to which it is transferred is being operated in compliance with federal law. Also, the RCRA permits the transportation of hazardous waste to treatment,

> storage or disposal facilities in compliance with regulations of the EPA and the Department of Transportation. Thus, the ordinances directly conflict with the federal law and frustrate the purpose of the RCRA and the CERCLA to safely dispose of hazardous waste in the manner deemed safest by Congress and by the EPA.

Id. at 842.

Courts addressing federal preemption under statutes similar to RCRA have reached the same conclusion. For example, in *Warren Co. v. State of North Carolina,* 528 F.Supp. 276 (E.D.N.C. 1981), a Warren County ordinance prohibited the storing, dumping or exposing of any substance containing a measurable amount of PCB within the boundaries of Warren County. The court addressed whether this ordinance was preempted by the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2601, et seq.:

> By enactment of these statutes [TSCA], it is clear that Congress intended to give states and localities some leeway to impose more stringent disposal requirements than those provided for by federal regulation. However, the issue for determination here is whether Congress intended to confer upon counties and other local governments the authority to totally frustrate the PCB disposal program through the implementation of total disposal bans.

Id. at 289. The court concluded that even though states are authorized to impose "more stringent requirements" than under the federal statute, a complete ban clearly stood as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress:

> If [the Supremacy Clause] of the Constitution means anything it must mean that a county may not pass an ordinance, the effect of which is to totally frustrate an entire statutory plan enacted by the Congress for the protection of citizens in all fifty states. Were the Court to approve this ordinance, no doubt the other 99 counties in North Carolina would quickly enact identical bans. . . . The Warren County ordinance clearly stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress under the Toxic Substances Control Act and, therefore, is void.

Id. at 290. *See also Rollins Environmental Services (FS), Inc. v. Parish of St. James*, 775 F.2d 626, 632-37 (5th Cir. 1985) (We conclude, therefore, that ordinance 85-1 is an impermissible intrusion into territory preempted under TOSCA and the enforcement of it would violate the supremacy clause of the federal Constitution".)

In the present case, the concern voiced by the court in the *Warren County* case could be echoed on an even larger scale. If this Court were to approve the challenged portion of House Bill 2912, then other states having salt dome formations could enact identical bans. In that case, even though RCRA expressly permits the disposal of non-liquid hazardous waste in salt dome caverns, the policy would have been completely frustrated. Section 6924(b)(2) of RCRA could literally be torn out of the statute books and thrown away, because it would be without meaning or affect.

The fact of the matter is that no one wants hazardous waste disposed of in their own city, county or state. As a result, if the mere fact that a hazardous waste disposal method falls within the "less favored" category of "land

disposal" is enough to uphold a complete ban on such a method, NIMBY laws and ordinances will run rampant.[2] States, counties and municipalities all over the country will ban the storage or disposal of hazardous waste in land fills and every other type of land-disposal facility that they don't want in their community, and if the Commission's position in the present case is upheld, those states, counties and municipalities will legally be able to do so. Forget about the fact that such facilities are, with appropriate regulatory guidelines, an integral part of Congress's plan to achieve safe disposal of hazardous waste – they can be banned simply because they are "less favored" than some other methods.

Even where a local restriction is less than a complete ban, RCRA still preempts the local law, if it is not a reasonable response to protect a legitimate local concern.

Some cases have preempted the local law even where it was not a complete ban on a particular activity relating to the disposal of treatment of hazardous waste. For example, in *Ogden Environmental Servs, v. City of San Diego,* 687 F.Supp. 1436 (S.D. Cal. 1988), the City of San Diego imposed, on top of EPA constraints, a requirement that parties seeking to incinerate hazardous waste first obtain a "conditional use permit". There were essentially

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[2] "NIMBY" is an acronym standing for "Not In My Back Yard", and it represents a syndrome that has become a significant problem in attempting to distribute equally the burdens of safe disposal of hazardous waste. Patrick O'Hara, *The N.I.M.B.Y. Syndrome Meets The Preemption Doctrine: Federal Preemption of State and Local Restrictions on the Siting of Hazardous Waste Disposal Facilities*, 53 La.L.Rev. 229, 229-30 (Sep. 1992).

no standards, however, for the grant or denial of such a permit. Thus, the ordinance allowed the City of San Diego to arbitrarily deny permits even where the requirements imposed by RCRA had been satisfied. The court held the ordinance preempted, stating that:

> Without deciding to what extent the city might impose additional environmental restrictions on the facility in exercising its traditional land use authority, I find that denial of the permit based on generalized environmental or health and safety concerns, where the EPA has already found the health, safety and environmental risk be acceptable, is impermissible under the doctrine of federal preemption.

Id. at 1448.

Likewise, in *Hermes Consol., Inc. v. State of Wyoming*, 849 P.2d 1302 (Wyo. 1993), Wyoming's Department of Environmental Quality sought to enforce state requirements after Hermes and the EPA had entered into a consent decree settling a prior dispute under RCRA. The State of Wyoming argued that it was simply imposing stricter standards pursuant to the savings provisions in 42 U.S.C. § 6929. The Wyoming Supreme Court rejected this argument and held that the standards sought to be imposed by the State were preempted:

> [A]lthough § 3009 [U.S.C. § 6929] allows states to adopt more stringent regulations, it does not authorize them to defeat safe federal solutions. We agree that "where the savings clause provision of § 3009 had been considered, it has been construed to authorize local adoption of more stringent environmental standards than the EPA, but not to allow local governments to directly subvert

> RCRA and EPA decisions by out right bans on activities federal authorities consider safe.

Id. at 1311 (quoting *People v. Teledyne, Inc.,* 599 N.E.2d 472, 477 (Ill. Ct. App. 1992)).

Even the cases that have found a less-than-complete ban not to be preempted have often stated or implied that if the restriction had been a complete ban on an activity, it would have been preempted. *See LaFarge Corp. v. Campbell,* 813 F.Supp. 501, 510-11 (W.D. Tex. 1993) ("Several district courts and courts of appeal have grappled with this or a similar issue, reaching the same conclusion: *if application of the local law or regulation does not result in an absolute prohibition of a type of technology* or prohibit importation of hazardous waste, federal law does not preempt it.") *Hazardous Waste Treatment Council v. Riley,* 938 F.2d 1390, 1395-97 (D.C. Cir. 1991) ("We construe the Regional Administrators' decision in this case as holding that Senate Bill 114 did not act as a prohibition on the treatment of hazardous waste within the meaning of 40 C.F.R. § 271.4(b), because it did not effect a state wide ban on the use of the GSX waste-treatment technology".)

In *Blue Circle Cement, Inc. v. Board of County Commissioners,* 27 F.3d 1499 (10th Cir. 1994), Blue Circle operated a quarry and cement manufacturing plant in Oklahoma. It sought to convert to using "hazardous waste fuels" to heat it kilns. The Commissioners of Rogers County, Oklahoma amended an ordinance to require such facilities using hazardous waste fuels to obtain a "conditional use permit" (i.e., it was not a complete ban). Blue Circle brought suit asserting, among other claims, that the Commissioner's zoning ordinance was preempted by RCRA. Holding that RCRA did not preempt the ordinance,

the district court granted summary judgment for the Commissioners.

On appeal, the Tenth Circuit reversed, holding that, notwithstanding the invitation in RCRA § 6929 for states and political subdivisions to adopt their own hazardous waste regulations, "a state or local zoning ordinance affecting hazardous waste disposal, treatment and recycling cannot imperil the federal goals under RCRA". *Id.* at 1506. After reviewing many of the cases in the area, the court stated:

> We draw from these cases several principles that inform our preemption analysis under RCRA. First, ordinances that amount to an explicit or de facto total ban of an activity that is otherwise encouraged by RCRA will ordinarily be preempted by RCRA. *ENSCO*, 807 F.2d. at 745; *Ogden*, 687 F. Supp. at 1446-47; *Jacksonville,* 824 S.W.2d at 842; *Rollins,* 371 So.2d at 1132. Second, an ordinance that falls short of composing a total ban on encouraged activity will ordinarily be upheld so long as it is supported by a record establishing that it is a reasonable response to a legitimate local concern for safety or welfare.

Id. at 1508.

Because the court referred to a ban of an "otherwise encouraged" activity as being preempted by RCRA, at first glance, this language seems to support the proposition that "encouraged" activities are the *only* methods of dealing with hazardous waste for which a complete ban will be preempted. Thus, putting the argument to its end, RCRA does not preempt a complete ban on any land-disposal method, because such activities are not statutorily

"encouraged." This position reads too much into the court's language.

The court in *Blue Circle* had before it a prohibition of an "encouraged" activity: the incineration of hazardous waste fuels. Thus, the only issue before the court was whether RCRA preempted a less than complete ban of an encouraged activity. The court did not have before it the issue of whether RCRA preempts a complete ban on any "less favored" activity nor a complete ban on disposal of hazardous waste in a salt dome cavern. In short, the fact that the prohibition in *Blue Circle* was of an encouraged activity made it an easier case, and it is certainly understandable that the court couched its opinion in terms that indicated as much. The court was simply not addressing the question that this Court has before it.

In sum, the cases support the proposition that a local ban of a hazardous waste disposal method that can, under appropriate regulatory guidelines, be used safely is an obstacle to the full purposes and objectives of RCRA, because it narrows the available options for managing hazardous waste.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-02-00219-CV

Secured Environmental Management, Inc., Appellant

v.

Texas Natural Resource Conservation Commission, Jeffrey Saitas, and The City of Mont Belvieu, Appellees

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FROM THE DISTRICT COURT OF TRAVIS COUNTY, 200TH JUDICIAL DISTRICT NO. GN102659, HONORABLE PAUL DAVIS, JUDGE PRESIDING

In this case, we determine whether a Texas statute, section 361.114 of the Health and Safety Code, which bans hazardous waste disposal in salt-dome formations, is preempted by the Federal Resource Conservation and Recovery Act ("RCRA"). *See* Tex. Health & Safety Code Ann. § 361.114 (West Supp. 2003); 42 U.S.C.A. §§ 6901-6991 (West 1995 & Supp. 2003). Before the Texas statute was passed, Secured Environmental Management ("SEM") had applied for a permit to dispose of hazardous waste in a salt-dome formation. After passage of the statute, the Texas Natural Resource Conservation Commission[1] (the "Commission") informed SEM that it would no longer consider the aspects of SEM's application dealing with

hazardous waste disposal in salt domes and requested that SEM revise its application to omit any mention of salt-dome hazardous waste disposal. In response to the Commission's request, SEM sought a declaratory judgment that section 361.114 was preempted by federal law and an injunction preventing the statute's implementation. The trial court held that 361.114 is not preempted. We agree with the trial court and will affirm.

BACKGROUND

In 1992, SEM applied to the Commission for a permit allowing a comprehensive waste disposal scheme, part of which involved a plan to store non-liquid hazardous waste in salt-dome formations. At that time, Texas provided by statute that certain regulatory requirements had to be met before hazardous waste could be deposited in salt domes. Among other things, a license applicant had to demonstrate that: (1) there existed an urgent public necessity; (2) salt-dome disposal was at least as safe as alternative disposal methods; and (3) the project would protect groundwater and public water supplies. Act of June 7, 1991, 72d Leg., R.S., ch. 296, § 1.20, 1991 Tex. Gen. Laws 1251 (amended 2001) (current version at Tex. Health & Safety Code Ann. § 361.114 (West Supp. 2003)). In addition, under the Commission's then-current rules, SEM would have had to explain the appropriateness of disposing of the particular type of waste in a given salt dome, taking into account the unique geology of that salt dome. *See* Tex. Admin. Code §§ 331.121(a), (d), (g) (2002) (superseded by statute, Act effective Sept. 1, 2002, 77th Leg., R.S., ch. 965, § 9.02, 2001 Tex. Gen. Laws 1965) (codified at Tex. Health & Safety Code Ann. § 361.114 (West Supp.

2003)). SEM faced a substantial statutory and regulatory hurdle in obtaining its permit.

The federal government has also placed substantial limitations on licenses for salt-dome hazardous waste disposal. RCRA, the federal omnibus statute regarding hazardous waste disposal, provides strict limitations on the licensing of salt domes for hazardous waste disposal. RCRA's provisions serve as minimum regulations; the states are generally empowered to adopt more strict regulations regarding hazardous waste disposal. *See* 42 U.S.C.A. § 6929.

If approved, SEM's program would have been the first use of salt-dome caverns to store hazardous waste in Texas. Salt-dome formations are mounds or plugs of salt buried in the earth's upper strata. They occur in areas where the soil is relatively porous and prone to groundwater contamination; sometimes they contain natural deposits of oil and natural gas. One method for exploiting salt domes for industrial use is "solution mining." A borehole is drilled deep into the salt, and water is pumped in to dissolve a portion of the salt. When the solution is extracted, a cavern remains inside the salt deposit. This method is traditionally used for storing reserves of natural gas and oil. Experience with the storage of fossil fuels suggests that such solution-mined caverns are not stable. They tend gradually to close because the salt itself tends to move. This movement can cause the cavern walls to crack, allowing whatever is contained inside to leach out into the surrounding area. Because of this danger, both the federal and state governments have created statutes carefully limiting any proposed use of solution-mined salt-dome caverns to dispose of hazardous wastes.

This Court has twice decided cases dealing with applications for this type of disposal program. *Hunter Indus. Facilities v. Texas Nat. Res. Conservation Comm'n,* 910 S.W.2d 96 (Tex. App. – Austin 1995, writ denied) (upholding Commission's rejection of applications to dispose of non-liquid hazardous waste in solution-mined salt domes); *United Res. Recovery v. Texas Water Comm'n,* 815 S.W.2d 797 (Tex. App. – Austin 1991, writ denied) (upholding Commission's rejection of plan to dispose of semi-solid hazardous waste in salt domes). The potential dangers involved in salt-dome disposal are considerable; only strict enforcement of federal and state waste-disposal systems can adequately protect the public health. *See Hunter,* 910 S.W.2d at 101; *United Res.,* 815 S.W.2d at 804 (holding that Water Commission could require *stronger showing* of salt dome's structural integrity than required by federal guidelines).

In 1999, the Texas Legislature banned the disposal of hazardous waste, solid or liquid, in solution-mined salt domes or sulphur mines.[2] Accordingly, the Commission issued a letter to SEM indicating that it was no longer possible to grant a permit for salt-dome hazardous waste disposal. The Commission requested that SEM revise its application to remove any plans to dispose of hazardous waste in salt domes. SEM chose not to amend its applications; instead, SEM brought this declaratory judgment action against the Commission to establish that the Texas statute was preempted by the applicable federal statute, RCRA.

SEM moved for summary judgment, contending that section 361.114 is preempted because it conflicts with RCRA's stated object and purpose. The Commission and the City of Mont Belvieu[3] both filed cross-motions for

summary judgment against SEM on the ground that section 361.114 did not conflict with the object and purpose of RCRA. The trial court granted the Commission's motion, held that its action on the Commission's motion impliedly disposed of any issues raised in Mont Belvieu's motion, and denied SEM's motion. SEM now appeals, arguing that the statute is, as a matter of law, preempted by federal law.

SEM argues that section 361.114 is preempted because, by specifically addressing salt domes in RCRA, Congress has mandated that they remain a potential means of disposing of hazardous waste in any waste disposal regime promulgated by the federal Environmental Protection Agency or an authorized state such as Texas. The Commission responds that, in accordance with RCRA's allocation of power between state and federal government, Texas has only enacted a *more stringent* requirement under its general power to regulate hazardous waste placed into landfills. We agree with the Commission.

DISCUSSION

The Resource Conservation and Recovery Act

In 1976, responding to growing concern about the disposal of solid and hazardous waste, Congress passed RCRA, which exhorted the Environmental Protection Agency ("EPA") to create national standards for the storage and disposal of hazardous waste materials.

RCRA creates "a viable Federal-State partnership" to carry out its purposes. 42 U.S.C.A. § 6902(a)(7) (West 1995). It does so principally through sections 6926 and 6929. *Id.* §§ 6926, 6929 (West 1995). Section 6929, RCRA's savings provision, empowers states to adopt regulations

"more stringent" than their federal equivalents. Section 6926 allows the EPA to "authorize" states to carry out their own hazardous waste programs "in lieu of" the federal program. An authorized state becomes the sole permitting authority for the storage, treatment, or disposal of hazardous waste within that state. *Id.* § 6925(b). Texas is an "authorized state" under section 6926. 40 C.F.R. § 272.2201 (2002). Thus, RCRA creates minimum standards below which the states may not set their waste disposal criteria, provides for the states to adopt more stringent standards, and allows some states, including Texas, to completely administer their own waste disposal programs.

In 1986, concerned that the EPA and various states had moved too slowly in creating workable waste disposal guidelines, Congress added a number of provisions creating standards to deal with particular hazardous waste problems. *See, e.g.*, 42 U.S.C.A. §§ 6924(b)-(y) (West 1995 & Supp. 2003). These provisions identified certain materials and disposal methods as impermissible, while imposing intermediate restrictions on certain other materials and disposal methods. For example, RCRA provides that "land disposal . . . should be the least favored method for managing hazardous wastes," as that method poses a "substantial risk to human health and the environment." *Id.* § 6901(b)(7) (West 1995). RCRA defines "land disposal" to include many different means for burying or obscuring waste, including salt-dome formations. *Id.* § 6924(k). RCRA defines hazardous waste as "a solid waste . . . which . . . may cause, or significantly contribute to an increase in mortality or an increase in serious irreversible . . . illness or . . . pose a substantial present or potential hazard to human health or the environment when improperly

treated, stored . . . or otherwise managed." *Id.* § 6903(5)(a)-(b) (West 1995). The EPA has the power, after a contested public hearing, to place substances on the list of hazardous waste subject to RCRA's provisions. *Id.* § 6921(a). In addition, certain wastes are denominated hazardous wastes by specific statutory provision. *See, e.g., id.* § 6921(e)(1) (declaring halogenated dioxins and halogenated dibenzofurans to be hazardous waste). Thus, the provisions of RCRA governing "hazardous waste" provide that any substance either specifically designated by Congress to be hazardous, or deemed by the EPA to be hazardous, shall at least be disposed of under the minimum safety standards set out by RCRA.

The Texas Health and Safety Code, section 361.114

Until the 2001 amendment, the Texas Health and Safety Code had provided extensive statutory and regulatory requirements for permitting hazardous waste disposal in salt domes. These included an affirmative showing of necessity and a demonstration that groundwater would not be affected by any hazardous waste placed in a salt dome.[4]

The legislature has, however, superseded that detailed statutory provision with the following:

Sec. 361.114. PROHIBITION OF DISPOSAL OF HAZARDOUS WASTE INTO CERTAIN GEOLOGICAL FORMATIONS.

The commission by rule *shall prohibit* the storage, processing, or disposal of hazardous waste in a solution-mined salt dome cavern or a sulphur mine

Act effective Sept. 1, 2002, 77th Leg., R.S., ch. 965, § 9.02, 2001 Tex. Gen. Laws 1965 (codified at Tex. Health & Safety Code Ann. § 361.114 (West Supp. 2003)) (emphasis added). Thus, the legislative amendment creates an outright ban on disposing of hazardous waste in solution-mined salt domes. The Health and Safety Code defines "hazardous waste" to include the same substances included in RCRA's omnibus list of dangerous substances. *Id.* § 361.003(12) (West 1995). Both the Health and Safety Code and RCRA, by definition, regulate disposal of the same substances. The only difference material to this case is in the specific provisions regarding salt-dome waste disposal.

Preemption Analysis

Because this suit was bought for declaratory judgment based only on the letter issued by the Commission, we have no administrative record nor any information specific to SEM's particular application. Rather, SEM argues that the Texas statute is preempted as a pure question of law, based on the text of the federal and Texas statutes involved. Therefore, we must determine whether, under RCRA's specific provisions and general preemption analysis, Texas's statutory restriction on solid hazardous waste disposal is preempted by RCRA.

The laws of the United States are the "supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. If a state law conflicts with federal law properly enacted by the Congress within its constitutional authority, the state law is preempted and has no effect. *Maryland v. Louisiana,* 451 U.S. 725, 746 (1981). In order to preserve

the states' dignity and autonomy, however, the courts have usually presumed that state laws will not be preempted in areas over which the states have traditionally exercised their independent authority. *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 229-30 (1947). When Congress clearly manifests its intent to preempt state regulation, however, the supremacy clause grants it that power. *See, e.g., Boggs v. Boggs,* 520 U.S. 833, 844 (1997).

The party asserting federal preemption bears the burden of proof. *Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238, 255 (1984); *Boon Ins. Agency, Inc. v. American Airlines, Inc.,* 17 S.W.3d 52, 55 (Tex. App. – Austin 2000, pet. denied), *cert. denied,* 531 U.S. 1113 (2001). Preemption can be demonstrated either explicitly or implicitly. Congress may expressly preempt state law in its enactments. *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 516 (1992). A federal statute may impliedly preempt state law if Congress states an intent to occupy the field of regulation in a particular area, or if a state law actually conflicts with federal law or regulations. *Freightliner Corp. v. Myrick,* 514 U.S. 280, 287 (1995). A state law may be said to conflict with federal law in two situations: (1) when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941), and (2) when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers v. Paul,* 373 U.S. 132, 142-43 (1963).

Federal statutes do not always preempt every aspect of regulation over a particular subject-matter. Many, including RCRA, have "savings clauses" that, instead of preempting state law outright, reserve to the states some specified degree of authority. *E.g.,* 42 U.S.C.A. § 6929. Any

state action that is not within the scope of the clause is expressly preempted. However, even when a federal statute's preemption clause does not clearly bar a state law, or the state law might be considered to be within the statute's savings clause, ordinary principles of implied preemption may still apply. *Geier v. American Honda Motor Co.*, 529 U.S. 861, 873-74 (2000). Although the overall goals of the state and federal law are the same, state law may be preempted in these situations "if it interferes with the methods by which the federal statute was designed to reach [its] goal." *International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987). When assessing the implied preemptive effect of a federal statute on a state statute, we must ask whether the statute is consistent both with the federal statute's structure and purpose, taken as a whole, and its objectives and policies. *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 89 (1992). We are to look not so much to the legislature's professed purpose in passing the statute, but at the "effects of the law." *Id.* at 90. A state statute will not be saved from preemption merely because it has some effect outside the scope of the federal statute. *Id.* Thus, in this case, we will consider whether "the practical impact" of section 361.114 interferes with the goals and methods of RCRA. *See Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979) (citing *Lacoste v. Department of La. Conservation*, 263 U.S. 545, 550 (1924)).

Whether RCRA preempts a particular state hazardous waste statute, then, depends on whether there exists an actual conflict between federal policy and local regulatory decisions. Some cases might require fact finding on the scope and effect of the state and federal regulations. *See Blue Circle Cement, Inc. v. Board of County Comm'rs*, 27

F.3d 1499, 1508-09 (10th Cir. 1994) (RCRA preemption question depends on whether, under *Gade,* there is a practical conflict between federal and local policy). The parties have stipulated that this would be the first time that salt-dome hazardous waste disposal has been attempted in the United States; there is no germane federal or state waste disposal program actually in existence. We have only RCRA's statutory language on which to base our determination. SEM takes the position that, read in light of RCRA's congressional findings, the specific language of section 6924(b), which establishes special rules regarding hazardous waste disposal in salt domes, evinces an affirmative Congressional policy that salt-dome disposal remain a potential means for disposing of solid hazardous waste. Therefore, according to SEM, section 361.114 is preempted because it conflicts with RCRA's object and purposes.

RCRA prohibits dumping and open waste-disposal sites, 42 U.S.C.A. § 6902(a)(3)-(7), but still allows for hazardous waste "treatment, *storage,* and disposal." *See id.* §§ 6903(3), (33), (34) (emphasis added). SEM considers this language to constitute the underlying policy of RCRA: to create a national waste disposal policy which includes salt-dome hazardous waste disposal. Because RCRA limits, rather than bans, land disposal, SEM takes the position that Congress created a requirement that land disposal be an element of any waste-disposal program under the authority of the EPA or the authorized states.

Following the 1984 amendments, RCRA has included a distinct subsection addressing salt-dome disposal for liquid and solid hazardous waste.

- **Salt dome formations, salt bed formations, underground mines, and caves**
- Effective on November 8, 1984, the placement of any noncontainerized or bulk liquid hazardous waste in any salt dome formation, salt bed formation, underground mine, or cave is prohibited until such time as
    - the Administrator has determined, after notice and opportunity for hearings on the record in the affected areas, that such placement is protective of human health and the environment,
    - the Administrator has promulgated performance and permitting standards for such facilities under this subchapter, and;
    - a permit has been issued under section 6925(c) of this title for the facility concerned.
- Effective on November 8, 1984, the placement of any hazardous waste other than a hazardous waste referred to in paragraph (1) in a salt dome formation, salt bed formation, underground mine, or cave is prohibited until such time as a permit has been issued under section 6925(c) of this title for the facility concerned.
- No determination made by the Administrator under subsection (d), (e), or (g) of this section regarding any hazardous waste to which such subsection (d), (e), or (g) of this section applies shall affect the prohibition contained in paragraph (1) or (2) of this subsection.
- Nothing in this subsection shall apply to the Department of Energy Waste Isolation Pilot Project in New Mexico.

42 U.S.C.A. § 6924(b). Liquid hazardous waste may not be disposed of in a salt dome under any circumstances until the EPA or the state has established that, in general, it

can be disposed of safely. *See Natural Res. Def. Council, Inc. v. United States Envtl. Prot. Agency,* 907 F.2d 1146, 1164-65 (D.C. Cir. 1990) (rejecting EPA rule that would have issued salt-dome liquid-waste permits on case-by-case basis). By contrast, non-liquid waste is subject to the permitting and policy decisions of either the EPA or the authorized state. 42 U.S.C.A. § 6924(b). Section 6924(b)(1) prohibits disposal of liquid hazardous waste in salt domes until such time as the licensing authority shall have adopted general rules and standards ensuring acceptable safety. Section 6924(b)(2) states that any hazardous waste not covered by paragraph one is "prohibited until such time as a permit has been issued under section 6925(c)."

SEM reads this statutory language to say that, because section 6924(b)(2) does not absolutely prohibit salt-dome disposal for solid hazardous waste, RCRA comprises an affirmative Congressional mandate that such disposal has been expressly selected as a *potentially safe* means of waste disposal. Therefore, SEM concludes, Texas's section 361.114 conflicts with the object and purpose of RCRA because the Legislature has enacted an *outright ban* on a disposal method permitted by RCRA. We disagree.

The Texas Health and Safety Code adopts RCRA's definition of hazardous waste. Tex. Health & Safety Code Ann. § 361.003(12) (West 2001) (defining hazardous waste as solid waste identified or listed as hazardous waste by EPA under RCRA's provisions). Section 361.114, then, bans hazardous waste disposal in "a solution-mined salt dome cavern or a sulphur mine." *Id.* § 361.114. This statute must be read in context with three applicable sections of RCRA defining the scope of RCRA's disposal policy regarding salt domes: 6925(c), under which the proper authority may issue disposal-site permits; 6925(k), which states that

land disposal, including among other things salt-dome disposal, should only be permitted when there is a factual finding of safety to human health and the environment; and 6924(b), which indicates that states may issue permits for disposal of hazardous waste in "any salt dome formation, salt bed formation, underground mine, or cave" only if it finds that such disposal protects human health and the environment as required by section 6925(c). 42 U.S.C.A. §§ 6924(b), (k), 6925(c).

Further, the applicable sections of RCRA create an outright ban on disposal of *liquid hazardous waste* in a set of geologic formations including salt domes, *id.* § 6924(b)(1), and a corresponding disapproval of solid-waste disposal in the same formations. *Id.* § 6924(b)(2). This is as specific an articulation of federal policy regarding salt-dome disposal as we have been able to glean from RCRA's plain language. We agree with SEM that RCRA seems to envisage the *possibility* that it might be safe at *some* point in time to permit the use of *some* of the underground geologic formations referenced in section 6924 to dispose of *some* hazardous waste. However, section 6929 explicitly reserves to the states the opportunity to enact more stringent standards. The Texas Legislature has made a decision to ban hazardous waste disposal in two of the geologic formations listed in section 6924. It has, furthermore, focused specifically on formations created through solution mining.[5] We construe this to be a precise, nuanced extension of RCRA's outright ban on liquid hazardous waste, taken together with the regulatory oversight ceded to the states by Congress.

SEM draws our attention to a line of cases it claims stands for the proposition that any ban on a particular means of hazardous waste disposal violates the object and purpose of RCRA and is, therefore, preempted. These decisions

have voided local government decisions that contravened actual federal programs and waste disposal decisions. *See, e.g., Rollins Envtl. Servs., Inc. v. Parish of St. James,* 775 F.2d 627, 634 (5th Cir. 1991) (parish ordinance purporting to ban disposal of "commercial solvents" preempted by EPA determination that PCBs could be disposed of safely); *ENSCO, Inc. v. Dumas,* 807 F.2d 743, 745 (8th Cir. 1986) (county ordinance banning disposal of "acute hazardous waste" despite EPA policy allowing hazardous waste disposal); *Ogden Envtl. Servs. v. City of San Diego,* 687 F. Supp. 1436, 1448 (S.D. Cal. 1988) (denial of city permit for waste combustion facility preempted by EPA's determination that proposed incinerator was sufficiently safe). The courts, using object-preemption analysis, held that even a local regulation that was stricter than a federal standard might, in some cases, be preempted. *E.g., ENSCO,* 807 F.2d at 745; *Rollins,* 775 F.2d at 634. In these cases, however, there existed a real danger that, by excluding waste from their territories, local governments would be able to avoid their responsibility for disposing of toxic waste generally. *See, e.g., Warren County v. North Carolina,* 528 F. Supp. 276, 289 (E.D.N.C. 1981). Thus, under SEM's authorities, RCRA may preempt state policies that are more stringent than federal requirements, *but only* if there exists an affirmative federal order or program. *See Blue Circle Cement,* 27 F.3d at 1508-09 (remanding for fact finding whether specific state statute interfered with technical implementation of actual federal standards). These decisions extend RCRA's preemptive scope in order to protect defined federal programs and policies undertaken specifically to fulfill RCRA's ultimate intent and purpose.

While we might in the abstract agree with the proposition that more stringent local government regulation should not be allowed to impede federal waste disposal programs, this record does not include even the outline of a federal program against which we might measure Texas's narrow legislative enactment. Because we are not faced with the problem dealt with by SEM's line of authorities, the question before us is whether Texas has acted within the power reserved to it under section 6929.

Because we find no specifically articulated Congressional intent to *require* solid hazardous waste disposal in salt domes, we must address the preemption question in terms of RCRA's savings clause. Section 6929 reads that states and local governments "may not impose any requirements less stringent" than those specifically provided for in RCRA, and at the same time state governments retain express authority to create regulations "more stringent" than those specifically provided in RCRA. 42 U.S.C.A. § 6929. Section 361.114, by placing a ban on certain means of waste disposal, creates a more stringent waste disposal regulation than RCRA's and, therefore, falls within section 6929's scope and is saved.

While Texas's section 361.114 may stand in some tension with RCRA, we conclude, as did the trial court, that they are not in conflict with one another. The Texas Legislature has simply extended the scope of RCRA's ban on an experimental and untested waste-disposal procedure; furthermore, the state ban reaches only underground areas cleared through solution-mining. If Congress has the ability to regulate waste disposal by creating an outright ban on liquid hazardous waste disposal in certain geologic formations, then Texas's power to enact more stringent regulations, pursuant to the savings clause, must include

the ability to extend that ban in order to meet the same underlying policy concerns. We cannot, therefore, say that the Texas statute is in conflict with RCRA's general policy of disfavoring ground disposal, read in light of its specific ban on liquid hazardous waste disposal in salt domes and other geologic formations.

It may be true, as SEM contends, that disposing of hazardous waste within the confines of a salt dome is safer than committing it directly to the ground. SEM refers us to the legislative history of the 1984 amendment in order to imply a purpose inherent in section 6924(b) to ensure that salt-dome disposal is available. This does not dissuade us from our reading of the statute's plain language. There is a presumption that Congress did not intend to preempt the state's traditional regulatory activities. *Geier,* 529 U.S. at 948 n.22; *Rice,* 331 U.S. at 229-30. Applying this presumption leads us to the conclusion that Texas is entitled to enact more stringent requirements than those provided in RCRA, including creating a narrowly crafted ban on a disapproved method of hazardous waste disposal.

Both parties have drawn our attention to an analysis of whether certain waste-disposal methods are "more favored" or "less favored" by RCRA. Although we concede that this may be an important issue in determining whether a state law or regulation actually interferes with or defeats an established federal waste disposal program, *see Blue Circle Cement,* 27 F.3d at 1508-09, it is not determinative in our reading of the two statutes as they have been presented to us under the facts of the case at bar.

Moreover, Texas enjoys a special status under RCRA in that it is an "authorized state," whose regulations may be adopted "in lieu" of the EPA's regulatory oversight.[6] 42

U.S.C.A. § 6296. A permit application under section 6925(c) addressed either to the EPA or an authorized state agency is not a guarantee; it will only issue when an applicant overcomes the presumption that land disposal should not be undertaken. *Id.* 6925(c). Section 6925(c) provides that permits will contain "such terms and conditions as the Administrator (or the State) determines necessary to protect human health and the environment." *Id.* This reinforces our conclusion: the actions of the state of Texas, as an "authorized state," are not preempted by the same Congressional enactment which expressly allowed for the creation of Texas as an authorized state. *See Hazardous Waste Treatment Council v. Reilly,* 938 F.2d 1390, 1398 (D.C. Cir. 1991) (noting that section 6929 explicitly gives states great deal of autonomy limited primarily by technical determinations of EPA).

Section 361.114 falls squarely within the power granted by RCRA to the states: to adopt more stringent requirements than those contained in RCRA itself or adopted by the EPA. Our determination is based on the breadth of RCRA's actual language, not on any assessment of the relative technical merits of different waste disposal methods. Accordingly, we overrule SEM's issue.

CONCLUSION

Absent any mention in the record of a practical federal program aimed at disposing of solid hazardous waste in salt domes, we hold that section 361.114 does not conflict with RCRA's stated object and purpose. Because section 361.114 is a "more stringent" regulation, it falls within RCRA's savings clause and is not preempted. Accordingly, we affirm the trial court's grant of summary judgment.

Mack Kidd, Justice

Before Justices Kidd, B.A. Smith and Yeakel

Affirmed

Filed: December 19, 2002

Publish

[1] Effective September 1, 2002, the Texas Natural Resource Conservation Commission's name was changed to the Texas Commission on Environmental Quality. *See* Act of June 15, 2001, 77th Leg., R.S., ch. 965, § 18.01, 2001 Tex. Gen. Laws 1985. Until January 1, 2004, the Commission has the discretion to use either name as it phases in the new nomenclature. Because the docketing statements name the TNRCC as a party, we will continue to use that designation.

[2] Sulphur mines are cleared through a solution mining process similar to that used to clear out salt-dome caverns for oil and natural gas storage. Only solution-mined salt domes are implicated in this appeal.

[3] The City of Mont Belvieu, which is situated near a large salt-dome formation heavily used by the oil and gas industry, intervened in the declaratory judgment action. Because we do not understand their legal position to be different from that taken by the Commission, we will deal with both the City's and the Commission's arguments collectively.

[4] For a full discussion of the former statute, see *Hunter Industrial Facilities v. Texas Natural Resource Conservation Commission,* 910 S.W.2d 96 (Tex. App. – Austin 1995, writ denied).

[5] We note that in Europe salt domes that have been mechanically mined, rather than solution mined, have been used for waste disposal. *See Hunter,* 910 S.W.2d at 100 n.5.

[6] The parties have joined issue on the potential effect of any EPA action. However, in the absence of any action by the EPA, this issue is not before us.

Cause No. GNI-02659

SECURED ENVIRONMENTAL MANAGEMENT, INC.,	§	IN THE DISTRICT COURT
Plaintiff,	§	
v.	§	
TEXAS NATURAL RESOURCE CONSERVATION COMMISSION ("TNRCC"); and JEFFREY A. SAITAS, in his official capacity as Executive Director of the TNRCC,	§	TRAVIS COUNTY, TEXAS
Defendants,	§	
and	§	
THE CITY OF MONT BELVIEU, TEXAS,	§	
Intervenor.	§	200th JUDICIAL DISTRICT

FINAL JUDGMENT

(Filed Mar. 29, 2002)

The Court has under advisement Cross-Motions for Summary Judgment in the above captioned case. Having reviewed the pleadings, motions, and responses and replies thereto, and having heard the arguments of counsel, the Court is of the opinion that there is no genuine issue as to any material fact regarding each and every element of the Plaintiff's cause of action against Defendants Texas Natural Resource Conservation Commission and Jeffrey A. Saitas. The Court is therefore of the opinion

that the Defendants' Motion for Summary Judgment should be granted.

The Court further finds that the Motion for Summary Judgment of Plaintiff, Secured Environmental Management, Inc., should be denied in all things.

The Court further finds that the City of Mont Belvieu's Plea in Intervention raised no legal issues distinct from those of the Defendants' Answer and Motion for Summary Judgment. Therefore, the Court is of the opinion that its actions with respect to the Plaintiff's and Defendants' cross-motions impliedly dispose of all issues raised by, and against, the Intervenor City of Mont Belvieu's Plea in Intervention.

It is therefore ORDERED ADJUDGED, AND DECREED, that Defendants Texas Natural Resource Conservation Commission and Jeffrey A. Saitas's Motion for Summary Judgment is granted in its entirety. All issues raised by and against the Intervenor City of Mont Belvieu, Texas are necessarily resolved by the Court's granting of the Defendants' Motion for Summary Judgment. As this concludes all issues in the case, final judgment is granted in favor of the Defendants Texas Natural Resource Conservation Commission and Jeffrey Saitas and Intervenor City of Mont Belvieu.

It is further ORDERED ADJUDGED, AND DECREED, that Plaintiff Secured Environmental Management, Inc.'s Motion for Summary Judgment is in all things denied, and Plaintiff shall take nothing by its cause of action.

This judgment finally disposes of all parties and claims and is appealable.

SIGNED the 28th day of March, 2002.

/s/ Paul Davis
HONORABLE PAUL R. DAVIS

Approved as to form
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RE: Case Number: 03-0289
Court of Appeals Number: 03-02-00219-CV
Trial Court Number: GN1-02659

Style: SECURED ENVIRONMENTAL MANAGEMENT, INC.
v.
TEXAS NATURAL RESOURCE CONSERVATION COMMISSION AND CITY OF MONT BELVIEU

Dear Counsel:

Today, the Supreme Court of Texas denied the petition for review in the above-referenced case. Justice Enoch not sitting.

Sincerely,

/s/ Andrew Weber
Andrew Weber, Clerk

by Nancy Vega, Chief Deputy Clerk

cc: Ms. Diane O'Neal, Clerk
Ms. Amalia Rodriguez-Mendoza, District Clerk